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No. 97-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILIP COATES, DIRECTOR OF
THE MASSACHUSETTS DIVISION OF
MARINE FISHERIES, ET AL.,

Petitioners,

v.

RICHARD MAX STRAHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CONSERVATION LAW FOUNDATION, INC. IN OPPOSITION

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32 pp

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MOTION OF CONSERVATION LAW FOUNDATION, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Conservation Law Foundation, Inc. ("CLF") respectfully moves for leave to file the attached Brief Amicus Curiae of Conservation Law Foundation, Inc. in Opposition. CLF requested and obtained from counsel of record for the petitioners his consent to filing of this brief. CLF requested the con-

sent of Richard Max Strahan, the plaintiff who appeared *pro se* in this case below and the respondent before this Court, but he withheld it. In support of this motion, CLF states:

1. This case involves an attempt to force officials of the Commonwealth of Massachusetts to bring the state's regulation of fixed fishing gear into compliance with the Endangered Species Act, 16 U.S.C.A. §§ 1536 *et seq.* (West 1985 & Supp. 1996) ("ESA") by protecting right whales and other endangered great whales from death and injuries due to entanglement in lobster pot lines and gillnets.

2. CLF is a regional environmental law organization with more than 12,000 members. Approximately 10,000 of those members reside in Massachusetts. CLF has offices in Massachusetts and three other New England states.

3. CLF was granted leave to file a brief *amicus curiae* and to participate in oral argument before the Court of Appeals for the First Circuit in this case. *See Strahan v. Coxe,* 127 F.3d 155, 157 (1st Cir. 1997) (*Strahan II*). CLF also filed memoranda and briefs and participated in hearings, oral argument and status conferences in the District Court. *See Strahan v. Coxe,* 939 F. Supp. 963, 966 (D. Mass. 1996) (*Strahan I*), Appendix to Petition for a Writ of Certiorari ("App.") at B-7 (referring to the first brief filed by CLF in the District Court).

4. Although petitioners state correctly that CLF "appeared and argued . . . in both the District and Circuit Courts," Petition for a Writ of Certiorari ("Petition"), Parties to the Proceeding, their characterization of CLF's position as supporting the plaintiff is inaccurate. While CLF agreed that

the petitioners' regulation of fixed fishing gear violated the ESA, it argued for a considerably more limited and carefully crafted remedy than the outright ban on lobster pots and gillnets sought by the plaintiff. *See Strahan I,* 939 F. Supp. at 967, 989, App. at B-8, B-67. More importantly for the purpose of this Petition, CLF was the only party to argue for affirmance of the District Court's order by the Court of Appeals. *See Strahan II,* 127 F.3d at 158, App. at A-3 ("Defendants appeal the district court's preliminary injunction order. Plaintiff Strahan cross-appeals the district court's . . . refusal to grant him the precise injunctive relief sought . . ."). Without CLF's participation, this Court is unlikely to receive any argument supporting denial of the Petition.

5. CLF has been involved for many years in other litigation and administrative proceedings relating to the protection of endangered species. CLF has been a petitioner or plaintiff in numerous cases involving claims under the ESA, including *Roosevelt Campobello International Park Commission v. EPA,* 684 F.2d 1041 (1st Cir. 1982); *Conservation Law Foundation v. Andrus,* 623 F.2d 712 (1st Cir. 1979); *Conservation Law Foundation v. Clark,* 594 F. Supp. 1373 (D. Mass. 1984); *Conservation Law Foundation v. Watt,* 560 F. Supp. 561 (D. Mass. 1983). Each of these cases involved activities that were likely to cause serious harm to endangered or threatened marine mammals. CLF has also filed comments in administrative dockets under the ESA.

6. CLF respectfully submits that its brief may aid this Court in deciding whether or not to grant the Petition.

7. For the foregoing reasons, CLF requests that this Court grant its motion to file the following Brief Amicus Curiae of Conservation Law Foundation, Inc. in Opposition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Did Massachusetts officials who licensed placement of lobster and gillnet fishing gear in the right whale's critical habitat "take" right and other endangered whales that were injured or killed as a result of entanglement in fishing gear, in violation of § 9(a)(1)(B) of the Endangered Species Act?

2. Did a preliminary injunction requiring Massachusetts officials to develop a proposal to restrict, modify or eliminate the use of fixed fishing gear in right whale critical habitat, in order to minimize the likelihood that additional whales would actually be harmed by such gear, violate the Tenth Amendment to the U.S. Constitution?

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Amicus curiae Conservation Law Foundation, Inc. ("CLF")[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in this case. The decision is reported as *Strahan v. Coxe* at 127 F.3d 155 (1st Cir. 1997).

STATEMENT OF THE CASE

Right whales are slow. They depend on coastal waters. They float when dead. These three unfortunate characteristics, combined with high commercial value as a source of baleen and blubber, gave these whales their common name: for centuries, they were the "right" whale to hunt. *Final Recovery Plan for the Northern Right Whale (Eubalaena glacialis),* National Marine Fisheries Service (December 1991) ("*Final Recovery Plan*") at 1. By 1935, the species was so depleted that most whaling nations agreed to ban its pursuit. *Id.* More than sixty years later, the right whale is still the most endangered large whale on earth. *Strahan v. Coxe,* 939 F. Supp. 963, 968 (D. Mass. 1996) ("*Strahan I*"), Appendix to Petition for a Writ of Certiorari ("App.") at B-10. With between 300 and 350 individuals left in the North Atlantic, and only 600 remaining in all the world's oceans, the likelihood of its recovery is uncertain at best. *Final Recovery Plan* at 1.

Plaintiff Strahan brought this action seeking a declaration that the petitioners' permitting of fixed fishing gear, includ-

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[1] Alan Wilson and Stephen L. Saltonstall co-authored this brief in its entirety. No person or entity other than CLF, its members, and its counsel made any monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

ing gillnets and lobster pots, took right and other endangered whales in violation of § 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C.A. § 1538(a)(1)(B) (West 1985 & Supp. 1996) ("ESA"). *See Strahan I,* 939 F. Supp. at 965-66 & n.7, App. at B-4 & n.7. He also sought an order enjoining the petitioners from issuing any new fishing permits and revoking existing ones. *Id.* at 967, App. at B-7 to B-8. While supporting the claims of violations of the ESA, CLF has advocated a considerably more limited remedy. *See id.* at 989, App. at B-67.

Although people no longer hunt right whales, certain human activities continue to threaten the species' survival and impede its recovery. Entanglement in fishing gear and degradation of habitat are principal causes of injury to right whales and to other marine mammals, such as the humpback whale. *Id.* The District Court found that "the entanglement of endangered whale species in fishing gear in Massachusetts waters causes injury or death to these species," *id.* at 984, App. at B-52 to B-53, and that entanglements had occurred with "fishing gear permitted by the Defendants in Massachusetts waters," *id.* at 985, App. at B-56.

The petitioners challenged these findings below, but the Court of Appeals upheld them. *Strahan v. Coxe,* 127 F.3d 155, 164-65 (1st Cir. 1997) ("*Strahan II*"), App. at A-19 to A-21. As the Court of Appeals observed, "the [district] court cited eleven occasions on which Northern Right whales had been found entangled in Massachusetts waters between 1978 and 1995." *Id.* at 165, App. at A-20. The Court of Appeals also sustained as reasonable "[t]he district court's inference that gear fixed in Massachusetts waters was licensed by the Commonwealth, and was not set illegally or brought into Massachusetts waters from another area by the whale. . . ." *Id.* at 165, App. at A-21. This inference was based on evi-

dence that, in at least three instances, entangled whales had been unable to escape or break free from the gear but remained anchored in Massachusetts waters. *See id.; Strahan I,* 939 F. Supp. at 984-85, App. at B-55 to B-56 ("The Defendants [did] not dispute any of this evidence.").

The Commonwealth's regulation of fisheries within Massachusetts waters is comprehensive. As the Court of Appeals observed:

> The Massachusetts Division of Marine Fisheries ("DMF") is vested with broad authority to regulate fishing in Massachusetts's coastal waters, which extend three nautical miles from the shoreline. Nearly all commercial fishing vessels must receive a permit from DMF in order to take fish, including shellfish, from Massachusetts coastal waters.

Strahan II, 127 F.3d at 159, App. at A-6 (citations omitted). Pursuant to this authority, the petitioners had previously imposed numerous limitations on gillnet and lobster pot fishing, including prohibition of their use in certain areas and at certain times of year, requirements for gear marking and maximum line length, limitations on the number of lobster traps, and removal of all sink gillnets from certain areas in specified months to respond to "the alarming depletion of the Harbor porpoise. . . ." *Id.; see Strahan I,* 939 F. Supp. at 974-75, App. at B-27 to B-29. The Commonwealth had also restricted the use of gillnets south and west of Cape Cod and within parts of Massachusetts Bay because of the importance of these areas to the right whale. *Strahan I,* 939 F. Supp. at 987-88, App. at B-63.

The waters regulated by the Commonwealth under its fisheries jurisdiction[2] include most of Cape Cod Bay, *see id.* at 991 n.46, App. at B-70 to B-72 n.46, which has unique importance to the survival and recovery of the right whale. The National Marine Fisheries Service ("NMFS") has designated Cape Cod Bay as critical habitat[3] for right whales under the ESA, 16 U.S.C.A. § 1533(a)(3)(1). *See* 59 Fed. Reg. 28,793 (1994) (codified at 50 C.F.R. § 226.13); *see also* 59 Fed. Reg. at 28,807 (map showing the area of Cape Cod Bay designated as critical habitat). Research published in 1990 "reported 2,643 sightings of 113 individual right whales in Massachusetts waters, with a concentration in the eastern part of [Cape Cod Bay]." 59 Fed. Reg. at 28,795. These individuals represented one-third of the total estimated North Atlantic population. Although primarily important as foraging habitat, the Bay also serves as a nursery and, occasionally, a calving area. *See id.* (Other researchers reported 21 sightings of small calves in 12 of the 26 years included in their study of the Bay.) The District Court found that the majority of right whales are present in Massachusetts waters

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[2] Massachusetts coastal waters are "all waters of the commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the commonwealth," Mass. Gen. Laws Ann. c. 130, § 1 (West 1991 & Supp. 1997), and within "three geographical miles from the shoreline," Mass. Regs. Code tit. 322, § 8.02.

[3] "Critical habitat" is defined, in relevant part, as "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. . . ." 16 U.S.C.A. § 1532(5)(A)(i).

during spring feeding, from approximately January 1 to May 15 each year. *Strahan I,* 939 F. Supp. at 968, App. at B-11.

Holding that the petitioners' fishing regulations violated the ESA's taking prohibition due to whale entanglement, the District Court entered a preliminary injunction requiring, in relevant part, that they (1) prepare a proposal to restrict, modify or eliminate the use of fixed fishing gear in the right whale critical habitat "to minimize the likelihood additional whales will actually be harmed by such gear;" and (2) convene an Endangered Whale Working Group to engage in substantive discussions with interested parties regarding modifications of fixed fishing gear and other measures to minimize harm to right whales. *Strahan I,* 939 F. Supp. at 990-91, App. at B-70 to B-73. These elements of the order were based on the District Court's finding that scientific evidence suggested implementation of a number of gear modifications could minimize the risk of entanglement. *See id.* at 990 n.46, App. at B-70 n.46. The Court of Appeals affirmed this exercise of equitable discretion. *Strahan II,* 127 F.3d at 166-71, App. at A-22 to A-36. It rejected the petitioners' "claim that, although the district court could have ordered an injunction barring all Commonwealth licensing activity, it could not require the Commonwealth to implement measures designed to accord Northern Right whales greater regulatory protection." *Id.* at 166, App. at A-22.

Following entry of the District Court's order, the petitioners convened the Endangered Whale Working Group and, on December 16, 1996, submitted a proposal to impose restrictions on gillnet and lobster pot fishing designed to reduce the likelihood of right whale entanglement. Record Appendix filed by the petitioners in the Court of Appeals ("R.A.") at 362-69. As the petitioners state, "the District Court did not enter further orders, but retained oversight authority over the

Commonwealth's regulatory efforts and measures." Petition for a Writ of Certiorari ("Petition") at 7. In fact, the petitioners expressly represented to the District Court that they intended to implement the proposal without further order pursuant to the Commonwealth's regulatory authority. *See* R.A. at 406; *see also* Mass. Regs. Code tit. 322, § 12 (regulations adopted pursuant to Mass. Gen. Laws Ann. c. 130, § 17(10) (West 1991 & Supp. 1997) whose "purpose . . . is to minimize the risk of right whale entanglement in Cape Cod Bay, especially in the Critical Habitat, during the period of right whale high use, January 1 through May 15. . . .")

On July 22, 1997, after the appeal in this case had been briefed and argued but before the Court of Appeals rendered its decision, NMFS promulgated a final interim rule under the Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361 *et seq.* (West 1985 & Supp. 1996). *See* 62 Fed. Reg. 39,157 (1997) (to be codified at 50 C.F.R. Part 229); *Strahan II,* 127 F.3d at 159, App. at A-5. The regulation prohibits lobster fishing in the Cape Cod Bay critical habitat from January 1 through May 15, unless the gear complies with specific requirements set forth in the rule, 62 Fed. Reg. at 39,185-86, and bans gillnet fishing entirely in the critical habitat during that period, unless in the future the agency approves gear modifications or alternative fishing practices that reduce the risk of entanglement, 62 Fed. Reg. at 39,186-87. The rule also includes specifications for lobster and gillnet fishing gear applicable throughout the year. *See* 62 Fed. Reg. at 39,185-86. The regulation applies in both state and federal waters along the east coast of the United States, except for areas specifically exempted. *See* 62 Fed. Reg. at 39,184-85. With respect to the portions of the Cape Cod Bay critical habitat in Massachusetts waters, "[t]he requirements in this interim final rule mirror the current regulations of the Com-

monwealth." 62 Fed. Reg. at 39,170. The "current regulations" of the Commonwealth are those adopted in response to the District Court's order. *See* Mass. Regs. Code tit. 322, § 12.

ARGUMENT

This Court will grant a petition for a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. Neither of the usual grounds supporting issuance of the writ is present in this case. There is no conflict among decisions of courts of appeals on the relevant issues; indeed, three other courts of appeals have interpreted the pertinent provisions of the ESA consistently with the First Circuit's opinion in this case. Nor does that opinion conflict with a decision of this Court. The Petition should therefore be denied.

Petitioners advance two lines of attack on the decision made by the Court of Appeals. First, they assert that, in affirming the District Court's preliminary injunction, the Court construed the ESA in a way that conflicts with the Tenth Amendment to the U.S. Constitution and this Court's decisions in *New York v. United States,* 505 U.S. 144 (1992) ("*New York*") and *Printz v. United States,* ___ U.S. ___, 117 S. Ct. 2365 (1997) ("*Printz*"). *See* Petition at 16-24. Second, they argue that the Court of Appeals' interpretation of the ESA's prohibition against "taking" endangered species, 16 U.S.C.A. § 1538(a)(1)(B), is inconsistent with *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* ___ U.S. ___, 155 S. Ct. 2407 (1995) ("*Sweet Home*"). *See* Petition at 25-28. The decision of the Court of Appeals correctly distinguished, however, between the District Court's imposition of equitable relief to halt a violation of Federal law and the Congressional commands to states and their offi-

cials that this Court held unconstitutional in *New York* and *Printz*. The Court of Appeals' interpretation of the ESA was also correct, and consistent both with this Court's analysis in *Sweet Home* and with the decisions of other Federal courts in similar cases. The petitioners have therefore failed completely to demonstrate the compelling reasons required to invoke this Court's discretionary review on a writ of certiorari. *See* Sup. Ct. R. 10.[4] Because the conclusion that the petitioners' regulation of fixed fishing gear violated the ESA is a logical predicate to analysis of whether the District Court's order represented a proper exercise of judicial authority, CLF will address the taking issue first.

I. THE COURT OF APPEALS' INTERPRETATION OF THE ESA'S TAKING PROVISION WAS CONSISTENT WITH *SWEET HOME* AND WITH THE DECISIONS OF OTHER FEDERAL COURTS.

A. *The Court of Appeals' Decision was Consistent with Sweet Home.*

Section 9(a)(1)(B) of the ESA makes it unlawful for any person subject to the jurisdiction of the United States to

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[4] Where, as here, the review sought is of an interlocutory order, the threshold to demonstrate compelling reasons is especially high. "Ordinarily, . . . 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case.'" R. Stern & E. Gressman, *Supreme Court Practice*, 196 (1993) (quoting *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893)). Although the petitioners note this consideration in passing, *see* Petition at 16, they offer no reason why it should not apply in this case.

"take" any endangered species. 16 U.S.C.A. § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C.A. § 1532(19). The prohibition against taking applies to any "person," defined broadly and including "any officer, employee, agent, department, or instrumentality . . . of any State or political subdivision thereof." 16 U.S.C.A. § 1532(13).

Sweet Home involved a facial challenge to the definition of "harm"[5] contained in the Department of the Interior's regulations implementing the ESA. 115 S. Ct. at 2410. This Court held that "the statutory term 'harm' encompasses indirect as well as direct injuries . . . ." *Id.* at 2413. This conclusion was based on the ESA's language, *id.* at 2412-13, its broad statutory purpose, *id.* at 2413-14, and on the addition by Congress in 1982 of authority for the Secretary of the Interior to issue permits for activity that would otherwise be prohibited "'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,'" *id.* at 2414 (quoting 16 U.S.C.A. § 1539(a)(1)(B)). This amendment "strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings." *Id.* In interpreting the ESA's taking provision to include indirect as well as direct injuries, this Court held the statute and the regulation's definition of harm to incorporate "ordinary requirements of proximate causation and foreseeability." *Id.* at 2414 n.13 ("The Secretary [of the Interior] did not need to include 'actually' [in the regulation] to connote 'but for' cau-

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[5] "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1995).

sation, which the other words in the definition obviously require.").

In the instant case, the Court of Appeals simply applied those ordinary requirements in addressing the petitioners' argument "that the district court improperly found that [their] regulatory scheme 'indirectly causes' these takings." *Strahan II,* 127 F.3d at 163, App. at A-16. The Court of Appeals rejected the petitioners' contention "that an interpretation of 'cause' that includes the 'indirect causation' of a taking by the Commonwealth through its licensing scheme falls without the normal boundaries." *Id.,* App. at A-16 to A-17. In so doing, it upheld the application of the *Sweet Home* analysis contained in the opinion of the District Court. *See id.* at 163, App. at A-16 ("We believe that . . . the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.")

The District Court concluded that petitioners' licensing of fixed fishing gear violated the ESA's taking prohibition in two respects. First, the District Court determined that permitting of fixed fishing gear by the petitioners was a taking in violation of § 9(a)(1)(B), 16 U.S.C.A. § 1538(a)(1)(B). *Strahan I,* 939 F. Supp. at 983-86, App. at B-50 to B-59. Second, it held that "permitting of fixed fishing gear by the Defendants results in a harmful taking of endangered whales through the modification of their habitat." *Id.* at 987, App. at B-62. The District Court expressly followed *Sweet Home's* discussion of indirect injury and proximate causation in reaching the first conclusion. *See Strahan I,* 939 F. Supp. at 985-86 & n.39, App. at B-56 to B-58 & n.39. It rested its second conclusion squarely on *Sweet Home's* holding that sustained the regulatory definition of "harm" to include

habitat modification which actually kills or injures wildlife. *See Strahan I,* 939 F. Supp. at 986-88, App. at B-59 to B-63.

Petitioners rely in particular on Justice O'Connor's concurring opinion in *Sweet Home* to buttress their argument that the ESA's taking prohibition does not apply to state officials exercising regulatory authority. See Petition at 16, 25-26. But Justice O'Connor's discussion of proximate cause directly supports the Court of Appeals' decision. As she explained:

> We have recently said that proximate causation 'normally eliminates the bizarre,' and have noted its 'functionally equivalent' characterizations in terms of foreseeability ('natural and probable consequence') and duty. Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.

115 S. Ct. at 2420 (O'Connor, J., concurring) (citations omitted). That an act's consequences depend on the occurrence of intervening events — including the actions of third parties — does not make those consequences unforeseeable. "It is not hard to imagine conduct that, while 'indirect' (i.e., nonpurposeful), proximately causes actual death or injury to individual protected animals. . . ." *Id.* at 2419 (unnumbered footnote).

The foreseeability of injury to right whales due to permitting of fixed fishing gear in their critical habitat is indisputable. Indeed, the District Court found specifically that "the Defendants know or should know that fishing gear injures or kills endangered whales." *Strahan I,* 939 F. Supp. at 986,

App. at B-58 (citing documents prepared by or under contract for the petitioners). As the Court of Appeals recognized, prior to complying with the District Court's order, "the state [had] licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that [was] likely to result in a violation of federal law." *Strahan II*, 127 F.3d. at 164, App. at A-17. That included licensing the placement of gear, without restrictions or specifications to reduce the likelihood of entanglement and injury, in the Cape Cod Bay critical habitat during the annual period of peak right whale activity.

The decisions of the courts below reflect careful consideration of the facts in this case, including the severity of the right whale's endangered status, the importance of the Cape Cod Bay critical habitat, and the breadth and detail of the Commonwealth's fisheries regulations. As Justice O'Connor said in her *Sweet Home* concurrence, "[t]he task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts." 115 S. Ct. at 2420 (O'Connor, J., concurring). Review by this Court is unwarranted.

B. *The Court of Appeals Followed Uniform Precedent Set by Other Federal Courts under the ESA.*

Every Federal court that has considered the question of whether a government agency exacts a prohibited taking when its regulations or other actions cause injury to endangered species has reached the same answer that the Court of Appeals did in this case. Of particular relevance is *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) ("*Defenders*"). There, the Court of Appeals for the Eighth

Circuit held that the Environmental Protection Agency ("EPA") violated § 9(a)(1)(B)[6] when plaintiffs showed actual poisoning of endangered species by an EPA registered pesticide containing strychnine, and the pesticide could be legally distributed only if its registration were approved by EPA. *Defenders,* 882 F.2d at 1301. "The relationship between the registration decision and the deaths of endangered species [was] clear." *Id.* Equally clear in the present case is the relationship between petitioners' licensing of fixed fishing gear in critical habitat and right whale entanglement. After analyzing the petitioners' regulation of fishing, the District Court concluded that in the absence of permitting, no entanglement of whales with fishing gear could occur. *Strahan I,* 939 F. Supp. at 985, App. at B-57; *see Strahan II,* 127 F.3d at 163, App. at A-15.[7]

Numerous other Federal courts have similarly held that government agencies violate the ESA's taking provision when their actions indirectly cause injury to endangered species. *See, e.g., Sierra Club v. Yeutter,* 926 F.2d 429, 438-39 (5th Cir. 1991) (finding the U.S. Forest Service's management of timber stands was a taking of the red cockaded woodpecker in violation of the ESA); *Palila v. Hawaii Dept.*

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[6] It is important to note that the holding in *Defenders* was grounded solely on the prohibition against takings in Section 9(a)(1)(B) and not on other duties imposed by the ESA on Federal agencies. *See Defenders,* 882 F.2d at 1300 ("Defenders do not appeal the [district] court's rejection of their other assertions of ESA violations. Thus, we consider only the takings issue.").

[7] The petitioners claim that "there is not even 'but-for' causation in this case." Petition at 27. That assertion ignores the fact that the applicable state statutes prohibit *all* commercial fishing, including lobster fishing, except as permitted by the petitioners. See Mass. Gen. Laws Ann. ch. 130, §§ 37, 38, 80.

of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) ("*Palila II*")[8] (holding the state's maintenance of mouflon sheep on state land where they were destroying habitat of the palila constituted a taking); *Loggerhead Turtle v. County Council of Volusia County,* 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995) (holding that a county's authorization of vehicular beach access during turtle mating season exacted a taking of turtles). These cases were all cited by the Court of Appeals, *see Strahan II,* 127 F. 3d at 163, App. at A-15 to A-16, and by the District Court, *see Strahan I,* 939 F. Supp. at 983, 987, App. at B-52, B-61 to B-62.[9] This is thus not an instance involving a conflict among courts of appeals, or

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[8] This Court granted certiorari in *Sweet Home* to resolve the "square conflict" between the decision of the Court of Appeals for the D.C. Circuit in that case and the Ninth Circuit's in *Palila II.* 115 S.Ct. at 2412. Although the direct conflict was over the issue of whether the Secretary of the Interior's definition of harm were valid on its face, *see id.* at 2409. the opinion of the Court nowhere questioned the application of the regulation in *Palila II.* In her concurring opinion, Justice O'Connor *did* criticize the application of the definition in that case, but the crux of her criticism was that "*Palila II* — under which the Court of Appeals held that the state agency committed a 'taking' by permitting feral sheep to eat mamane-naio seedlings that, when full-grown might have fed and sheltered endangered palila — was wrongly decided according to the regulation's own terms. *Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.*" 115 S. Ct. at 2420-21 (O'Connor, J., concurring) (emphasis added). Here, there is no question that entanglement with fishing gear permitted by the petitioners has injured identifiable right whales. *See Strahan I,* 939 F. Supp. at 984-85, App. at B-52 to B-56.

[9] The District Court cited additional cases applying the taking prohibition on facts analogous to those in this case. *See Strahan I,* 939 F. Supp. at 983-85, App. at B-51 to B-52, B-57.

otherwise calling for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10.

Petitioners attempt to dismiss these precedents because they did not deal with "state regulatory agencies," Petition at 27 n.21, but this purported distinction is immaterial. *Palila II* stands for the proposition that the prohibition contained in § 9(a)(1)(B) applies to state agencies whose actions indirectly harm endangered species, in that case through modification of habitat. *Defenders* establishes that a Federal agency's regulation of a substance, the lawful use of which required the agency's approval, violates the statute when the substance kills endangered species. Together, these cases and the others cited above fully support the decision of the Court of Appeals in this case. In none of them did the outcome hinge on whether the agency were Federal or state, or whether it acted in a regulatory or proprietary capacity. In the context of the ESA, proximate cause depends not on the capacity of the actor but on the causal relationship between the action and the result (cause-in-fact), and the foreseeability of harm. In light of the uniformity with which Federal courts have interpreted and applied the ESA's taking prohibition, compelling reasons for review by this Court are absent.

II. THE COURT OF APPEALS CORRECTLY DISTINGUISHED *NEW YORK* AND *PRINTZ*.

In *New York,* this Court held unconstitutional under the Tenth Amendment[10] a provision of the Low-Level Radioac-

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[10] The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

tive Waste Act, 42 U.S.C.A. § 2021e(d)(2)(C) (West 1994 & Supp. 1996), that required a state which failed to provide for waste disposal in accordance with Federal policy to take title to low-level radioactive waste upon the request of the generator or owner. *See* 505 U.S. at 153, 174-77. The Court pointed out that "[m]ost of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws." *Id.* at 160. But *New York* was not such a case: it "concern[ed] the circumstances in which Congress may use the States as implements of regulation." *Id.* The statutory provision under scrutiny in *New York,* in other words, directed its commands exclusively to the states and not generally. The ESA, however, *is* generally applicable.[11]

As the Court of Appeals stated, "a valid act of Congress, enacted pursuant to its Commerce Clause powers, seeking to regulate a particular area, is the 'supreme law of the land,' and preempts state laws or regulations that conflict with the act." *Strahan II,* 127 F.3d at 167, App. at A-26 (citing U.S. Const. art. VI, cl. 2 (the supremacy clause)). The Court of Appeals expressly followed this Court's summary of case law in *New York,* which stated that "'where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of either regulating in this area according to federal standards or having state law preempted. . . .'" *Strahan II,* 127 F.3d at 170, App. at A-33 (quoting *New York,* 505 U.S. at 167). In *New York,* moreover, this Court drew a clear distinction between Congressional commands that states implement a federal regulatory program and cases upholding

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[11] As discussed in Section I.A. above, the ESA's taking provision applies to any "person," and person is defined broadly. *See* 16 U.S.C.A. §§ 1538(a)(1)(B), 1532(13).

"the power of federal *courts* to order state officials to comply with federal law." 505 U.S. at 179 (emphasis in original; citations omitted). "[T]he text of the Constitution plainly confers this authority on federal courts. . . ." *Id.*

The Court of Appeals focused on the precise nature of the District Court's order requiring the petitioners to convene the Working Group and develop a proposal for modified fishery regulations. First, it emphasized what the order did *not* do. "The district court did not order the Commonwealth to ban gillnet and lobster pot fishing although the defendants incorrectly, and repeatedly, so claim throughout their brief." *Strahan II,* 127 F.3d at 168, App. at A-29. Instead, the District Court allowed the petitioners to determine exactly how to conform their regulations to the requirements of the ESA:

> The situation is not one in which the district court has directed the state to enact a particular regulatory regime that enforces and furthers a federal policy. . . . Rather, the court directed the defendants to find a means of bringing the Commonwealth's scheme into compliance with federal law.

Strahan II, 127 F.3d at 169-70. Indeed, the District Court had expressly noted "[t]he difficulty . . . in fashioning an injunction that respects the contours of both the powers and limitations of a federal court and the protection afforded to an endangered species." *Strahan I,* 939 F. Supp. at 989.

On the facts of this case, *Printz* adds nothing to this analysis under *New York.* In *Printz,* this Court held that "Congress cannot circumvent [the *New York*] prohibition by conscripting the State's officers directly." 117 S. Ct. at 2384.

The statutory provision at issue in that case directed its command to implement a federal regulatory program at state law enforcement officers, rather than at the states themselves. As the Court of Appeals recognized, in *Printz* this Court simply followed the reasoning of *New York*. *See Strahan II*, 127 F.3d at 169, App. at A-31. *Printz* is therefore similarly distinguishable from the instant case. The opinion of the Court of Appeals was thus consistent with both *New York* and *Printz* and presents no conflict on this ground with decisions of this Court.

III. The Petition Raises No Issue of Substantial Public Interest Justifying Discretionary Review by this Court.

In a decision applying a predecessor to Sup. Ct. R. 10, the Court stated that "this Court does not sit to satisfy a scholarly interest in . . . issues." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). "'Special and important reasons'[12] imply a reach to a problem beyond the academic or episodic." *Id.* In the instant case, however, reversal of the Court of Appeals' decision would not change the substantive rules applicable to fishing gear in the right whale critical habitat.

This case involves two significant public interests, but review by this Court will affect neither. The first is the public interest underlying the ESA itself. In the frequently quoted

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[12] *Compare* Sup. Ct. R. 19 (in effect when *Rice* was decided and requiring "special and important reasons" to grant a writ of certiorari) *with* Sup. Ct. R.10 (requiring "compelling reasons"). The current rule does not appear to have lowered the threshold.

words of this Court, "examination of the language, history, and structure of [the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities. . . . The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill,* 437 U.S. 153, 174, 184 (1978). A secondary but legitimate interest is that of Massachusetts and its fishermen in their economic livelihood. But even if this Court were to grant a writ of certiorari and ultimately reverse the decision below, and even if the petitioners then rescinded their regulations protecting right whales from entanglement, there would be no change in the way these two interests intersect. In the waters of Cape Cod Bay, substantially the same fishery regulations would still apply under Federal authority.

Because NMFS has adopted regulations that "mirror" those of the Commonwealth adopted in response to the District Court's order, 62 Fed. Reg. at 39,170, virtually the same measures protecting right whales and restricting commercial fishing would remain in place. *Compare* 62 Fed. Reg. at 39,183-88 *with* Mass. Regs. Code tit. 322, § 12. Although there are differences in the details of the two regulatory programs, the practical effect of these differences on whales and fishermen is minor. An appeal whose reach would be merely academic to the real interests at stake is hardly sufficient to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the First Circuit in this case.

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